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May 12, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 676, Rail Transportation
Contracts Under 49 U.S.C. 10709

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are the "Comments of Edison Electric Institute." We understand that this submission is sufficient to satisfy the Board's filing requirements, and that service on a service list is not required. Please advise if any of that is not correct. Thank you for your cooperation.

Very truly yours,

Michael F. McBride
Attorney for Edison Electric Institute

SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

COMMENTS OF EDISON ELECTRIC INSTITUTE

Pursuant to the Decision served March 12, 2008 in this proceeding, Edison Electric Institute ("EEI") hereby submits its Comments.

Interest of EEI

EEI is the association of U.S. shareholder-owned electric companies. Its members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70% of the U.S. electric power industry. It also has as Affiliate members more than 65 International electric companies and, as Associate members, more than 170 industry suppliers and related organizations. The electric industry depends on the Nation's railroads to transport approximately 70% of the Nation's electricity. Therefore, railroad service is vital to assuring that sufficient electricity is generated to meet the Nation's ever-growing demand for it.

Much of the rail transportation provided to EEI's members is provided under contract, but EEI members choose, from time to time, to have a railroad publish a common carriage (*i.e.*, tariff) rate, in order to seek relief from this Board because the railroad possesses market power and the EEI member believes that not only is the contract rate offered by the rail carrier not

commercially acceptable to the EEI member, but also that the common carriage rate quoted by the rail carrier is not "reasonable" within the meaning of 49 U.S.C. §§ 10701 and 10707.

The Board's Proposal

At page 4 of its Decision served March 22, 2008, the Board stated that

"Specifically, we are instituting a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. Moreover, it would advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before the Board. The proposal would also require that, before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options."

Comments

EEI supports the Board's proposals, with suggested slight modifications

to the language in the Board's proposed disclosure statement to clarify what EEI believes was intended and which is, in any event, good public policy.¹

Recent proceedings involving (a) a complaint filed by Kansas City Power & Light Company ("KCP&L") against Union Pacific Railroad Company ("UP") (*see* Decision issued in STB Docket No. 42095, served March 27, 2007), (b) a Petition for Declaratory Order filed by UP (*see* Decision issued in Finance Docket No. 35021, served May 16, 2007), and CSX's motion to dismiss Dupont's pending rate complaints against CSX (*see* Decision served December 20, 2007 in STB Docket Nos. NOR 41999, *et al.*) have demonstrated the need for clarity about what is, and what is not, a rail transportation contract within the meaning of 49 U.S.C. § 10709. The

¹ The Board stated that it "welcomes suggestions from parties as to what language should be included in this full disclosure/informed consent requirement." *Id.*

need for clarity arises because, *inter alia*, contract transportation is not generally subject to the Board's jurisdiction, while common carrier transportation is subject to the Board's jurisdiction. Accordingly, EEI supports the Board's first proposal – to “impos[e] a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709.” Decision served March 22, 2008 at 4.

The comments and reply comments filed by shippers and carriers in the Board's Ex Parte No. 669 proceeding (including by EEI) expressed widespread agreement that, as a matter of state law, the intention of the parties to a transaction may be highly relevant to whether they intended to enter into a contract. The Board's first proposal is that a railroad be obliged to provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The proposed disclosure statement would also explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board, has the great virtue of requiring a railroad to state clearly its intentions, in writing, to a shipper, that the carrier intends the document to be a contract outside the STB's jurisdiction, so that the shipper is not misled about the railroad's intentions. That could be useful to the Board or to another tribunal (such as a court or arbitration panel) in the event a dispute arises about the documents that are generated as a result of the parties' transaction.² A railroad making such a representation to a shipper could not, it would seem, later deny that the transaction resulted in a contract.³

² If, for example, the parties intend that the transaction *not* be considered a contract subject to the Board's jurisdiction, and so state, the Board will presumably not need to engage in the type of show-cause order it engaged in with KCP&L and UP in Finance Docket No. 42095.

³ A shipper denying such a claim, if it did in fact sign the document, would have to make a showing that, despite those words, the document was, nevertheless, *not* an enforceable contract (*e.g.*, if it were considered an adhesion contract, or is contrary to public policy).

The Board's disclosure statement should be adopted, as far as it goes. However, the disclosure statement is ambiguous in a crucial respect, in that it does not make clear what it seems the Board intended – that the railroad must offer each *separate* rate in a tariff if a shipper so requests, without thereby rejecting *other* rates offered under a contract. If the Board does not order a railroad to publish separate tariff rates for each such rate, a railroad may attempt to offer tariff rates on those lanes for which tariff rates have been requested, but make it clear that the shipper must take *all* of the railroad's proposed contract rates, and cannot decline only those it may challenge before the STB. Such a tying arrangement is likely to be anti-competitive, and is clearly intended to use a railroad's market power to prevent shippers from bringing legitimate disputes to the Board for adjudication. This Board should not countenance such heavy-handed tactics, which clearly can only work if rail carriers have market power and use it. Yet, such a practice is not unusual, as the recent testimony in Ex Parte No. 677 demonstrated.

Accordingly, EEI recommends that the STB adopt the following disclosure statement, as a rule binding on all railroads subject to its jurisdiction (relying on the Board's proposed language at page 4 of its Decision served March 12, 2008, but with additional words suggested by EEI in bold):

"Each carrier [shall] provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The statement [must] explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board.

"[Each carrier shall] advise the shipper that it has a statutory right to request a common carriage rate [for each separate movement] that the carrier would then have to supply promptly [without tying its provision of a common carriage rate to its offer of one or more contract rate(s) for one or more different movement(s) from the movement for which a common carriage rate is being offered], and such a [common carrier] rate might be open to challenge before the Board. Before entering into a rail transportation contract, the carrier [shall] provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forego, its regulatory options."

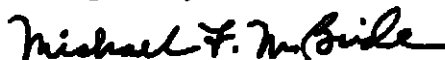
If the Board adopts EEI's proposed language, the parties' relative bargaining power will be what Congress intended in the Staggers Rail Act of 1980, viz., allow the parties to rely on competition to the maximum extent possible, instead of regulation, to determine rates and other terms applicable to the transportation, by allowing the parties to enter into contract rates where they have agreed on such rates, but also to permit a shipper to seek regulatory relief from the STB where a rail carrier has market dominance and has, relying on its market power, not offered a rate that reflects a competitive market. See Rail Transportation Policy, 49 U.S.C. § 10101.

At the same time, any shipper who preferred to enter into a contract for *all* of the rates offered by the rail carrier would, of course, remain entitled to do so, without regulation by the Board. (Many EEI members do enter into contracts for their rail transportation, which EEI's proposal would not affect.)

Conclusion

EEI appreciates the opportunity to submit comments on this important subject, and urges the Board to adopt its proposed rule, with the changes to the Board's proposed disclosure statement EEI proposes herein.

Respectfully submitted,



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